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Supreme Court, U.S.
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No. 00-201

IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Are reproduction and distribution of a periodical in electronic form, as well as in print, privileged under Section 201(c) of the Copyright Act or does electronically publishing the same content infringe upon the copyrights held by contributing freelance authors?

STATEMENT PURSUANT TO RULE 29.6

Petitioner The New York Times Company states that it has no corporate parents, and that no publicly held company owns 10% or more of The New York Times Company's stock.

Petitioner Newsday Inc. states that The Tribune Company is its corporate parent, and that no other publicly held company owns 10% or more of Newsday, Inc.'s stock.

Petitioner Time Inc., formerly known as the Time Inc. Magazine Company, states that Time Warner Inc. is its corporate parent, and that Time Inc. has no publicly traded stock.

Petitioner University Microfilms Inc. states that Bell & Howell Co. is its corporate parent, and that no other publicly held company owns 10% or more of University Microfilms Inc.'s stock.

Petitioner LEXIS/NEXIS (formerly known as Mead Data Central) states that LEXIS/NEXIS is a division of Reed Elsevier Inc., whose corporate parents are Reed International P.L.C. and Elsevier N.V., and that LEXIS/NEXIS has no publicly-traded stock.

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TABLE OF CITATION CONVENTIONS USED IN THIS BRIEF

For clarity and ease of reference, a number of short form citations to legislative materials have been adopted for use in this brief.

Full Title of Source	*Short Form*
Statutes	
Copyright Act of 1976, *codified at* Title 17, U.S.C.	"Act" or "1976 Act"
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Full Title of Source (cont'd)	*Short Form (cont'd)*
Final Report of the National Commission on New Technological Uses of Copyrighted Works (Library of Congress 1979)	"CONTU Report" (J.A. 709a-716a)

BRIEF FOR PETITIONERS

Petitioners The New York Times Co., Newsday Inc., Time Inc., University Microfilms Inc. and LEXIS/NEXIS respectfully request that this Court reverse the judgment of the Second Circuit in this matter.

OPINIONS BELOW

The district court's opinion (per Sotomayor, D.J. (now circuit judge)) granting petitioners' summary judgment motion (Cert. Petition App. ("Cert. App.") 23a-80a) is published at 972 F. Supp. 804. The district court's subsequent opinion denying reconsideration (Cert. App. 83a-105a) is published at 981 F. Supp. 841. The court of appeals' opinion (per Winter, C.J., joined by Miner and Pooler, JJ.) reversing (Cert. App. 1a-22a) is published at 206 F.3d 161. The court of appeals' orders denying rehearing and rehearing en banc (Cert. App. 106a-107a) and staying its mandate (*id.* 111a-113a) are not otherwise published.

JURISDICTION

The court of appeals entered its opinion on September 24, 1999, and denied rehearing and rehearing en banc on April 6, 2000. Justice Ginsburg subsequently extended the time to file a petition for a writ of certiorari to and including August 4, 2000. The petition, filed on August 4, 2000, was granted on November 6, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Copyright Act of 1976 (the "Act"), 17 U.S.C. § 101 *et seq.*, are reprinted in the appendix to this brief at 1a-13a.

STATEMENT OF THE CASE

This is a copyright case brought by freelance authors (respondents) against the publishers of a number of periodicals and their licensees (petitioners). Respondents contributed articles that appeared in the print editions and also in electronic copies of the publications. The case arises because respondents claim that the periodicals, when

published electronically, violate the copyrights in their individual contributions.

These electronic versions or "copies"[1] of the periodicals are the modern successors to microfilm and microfiche. They continue, in media that are now common and efficient, the long-standing practice of making periodicals available in formats especially well-suited for research purposes. Because completeness and editorial integrity are essential for research, these electronic "copies" contain the entire editorial content of the periodicals and, in many instances, are exact duplicates of the entire periodicals. When stored on a cumulative basis, they serve as vast library stacks that can be searched quickly and accurately. A few decades ago, a researcher would locate articles by first studying subject headings in the *Reader's Guide to Periodical Literature* or *The New York Times Index* and then physically retrieving the hard copy in the stacks or the appropriate pages on microfilm or microfiche copies of the publications. Now, the identical research can be performed far more efficiently and successfully through electronic searches on a computer.

The district court rejected respondents' infringement claim based on a meticulous study of the text and legislative history of the Copyright Act. The district court held that the electronic copies were privileged under Section 201(c) of the Act, which permits publishers of "collective works," such as periodicals, to reproduce and distribute freelance contributions as part of a periodical and "any revision" thereof.

The Second Circuit reversed in a decision that conflicts with the plain text of Section 201(c), the structure and purpose of the Act and longstanding copyright principles. The particular electronic copies challenged in this case, which in many instances include exact duplicates of the original periodicals and in all instances include the original editorial content in its

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1. "Copies" are the "material objects" in which any copyrightable work, including the collective works at issue in this case, are "fixed," that is, made "sufficiently permanent . . . to be perceived." 17 U.S.C. § 101 (defining "copies" and "fixed").

entirety, fit squarely within the congressional grant to publishers set forth in Section 201(c). Congress enacted Section 201(c) to ensure the right of contributing authors to exploit their individual works, *not* to prevent publishers from reproducing or distributing original or revised editions of their periodicals. More generally, it intended to further, not impede, the development of easily accessible electronic libraries and to promote the widespread dissemination of copyrighted works for the public good.

The Second Circuit's contrary ruling turns this clearly expressed congressional intent on its head, because it will require the mass deletion of freelance contributions from those libraries, as well as the outright destruction of media, such as CD-ROM discs, that may contain such contributions. Congress intended precisely the opposite result.

I. The Parties And Works At Issue In This Proceeding.

A. *Petitioners And The "Collective Works" They Publish.* Petitioners are publishers and their licensees. The publishers produce a number of prominent newspapers and special interest magazines, including *The New York Times* (the "*Times*"), *Newsday* and *Sports Illustrated* (collectively, the "Publications"). The Publications are published in print form, on microfilm and microfiche and also electronically. The publishers hold copyrights in each issue or edition of their respective Publications.

Petitioner LEXIS/NEXIS provides the NEXIS service. NEXIS is comprised of hundreds of libraries, each of which contains the contents of a periodical or periodicals.[2] For example, NEXIS has contained libraries for the *Times* since 1983, *Newsday* since 1988 and *Sports Illustrated* since 1982. NEXIS contains the Publications' complete editorial contents

2. The information contained in the NEXIS service is stored on a series of large interconnected discs housed in computers, or servers. These devices function similarly to library stacks: When an end-user requests information from a particular library within the NEXIS system, the computer locates the information by referencing internal indexing codes, and then retrieves the information from the electronic "stacks" for the end-user.

— *i.e.*, all of the articles, editorials, letters to the editor and similar materials — although not graphical materials (such as box scores or photographs and advertisements) and certain agate-type entries (such as paid death notices) that are incompatible with the limits of the ASCII-text format that was dominant when the libraries were originally created.[3]

The NEXIS "search engine" permits users to search the libraries according to individualized criteria. End-users can retrieve either individual articles or (as the district court found) can "generate all of the articles — and only those articles — appearing in a particular periodical on a particular day." Cert. App. 30a. When retrieved, a search result displays information regarding the hard copy edition of the publication in which each article appears, including the publication name, the date and the page number.

The creation of the electronic copies of the Publications stored in these libraries mirrors the creation of the print copies. As the district court found, the "publishers deliver or electronically transmit to NEXIS the full text of all of the articles appearing in each daily or weekly edition of their periodicals." Cert. App. 29a. Specifically, the same computer files are sent to NEXIS as are sent from the editorial desk to the printing facilities in order to print "the hard copy versions of their periodicals." *Id.* These files contain the complete text of each day's or week's issue, including headlines, photograph captions, bylines and page, section and other references to the layout of the paper edition. *Id.*; Joint Appendix ("J.A.") 471a-76a. Once received by NEXIS, these files are added to the

3. ASCII ("American Standard Code for Information Interchange") is a standard means for storing textual data that became prevalent in the 1960s. It assigns a unique 7-bit binary number for each upper- and lower-case letter, numeral, punctuation symbol and other character of the typewriter keyboard. Thus, by definition, it cannot be used for photographical information. Charles E. MacKenzie, *Coded Character Sets, History and Development*, 211-13 (1980). As technology evolved, other digital formats, such as the image-based format used for many of the copies in this case, have become common.

appropriate NEXIS electronic library in their entirety and without any intervening selection or revision to their substantive content. Cert. App. 29a.

Petitioner UMI is the world's largest producer of informational CD-ROM products, including *The New York Times OnDisc* ("*NYTO*"), a product that contains the same searchable ASCII-text information as the *Times* library in NEXIS. Pursuant to a three-way agreement among the *Times*, NEXIS and UMI, "NEXIS provides UMI with magnetic tapes containing . . . the same data furnished by the [*Times*] to NEXIS." Cert. App. 30a. UMI then transfers these files, entirely and without revision, to CD-ROM discs. *Id.* As with NEXIS, end-users of the *NYTO* product may retrieve in its entirety the complete editorial content of any day's edition of the *Times*.

UMI also produces a second CD-ROM product, *General Periodicals OnDisc* ("*GPO*"), which contains exact duplicate images of entire copies of periodicals, including *The New York Times Sunday Magazine* and *The New York Times Book Review*. Complete copies of the printed editions of these periodicals are digitally scanned and "burned" onto CD-ROMs. Cert. App. 31a. As a result, "[a]rticles appear precisely as they do in print, complete with photographs, captions, and advertisements." *Id. GPO* has a search engine that utilizes an accompanying abstract.[4]

B. *Respondents And The Articles They Contributed.* Respondents are six freelance authors. Between 1990 and 1993, they wrote twenty-one articles (collectively, "the Articles") that were published in the Publications. No contract between any of the petitioners and respondents limits reproduction of the Articles to print copies of the

4. Microfilm and microfiche copies of the Publications are created the same way as *GPO*: by photographically reproducing each hard copy page of the periodical. Instead of digitally converting that information, UMI fixes photographic negatives of the issues onto plastic film, which reproduces the image of the hard copy periodical when light is shone through it.

Publications or otherwise restricts electronic distribution.[5] In fact, each of the respondents *admitted* that no agreement limited petitioners' rights to the print medium and that they had not, prior to filing this suit, objected to publication in other media, such as electronically or on microfilm. J.A. 486a-87a, 488a, 489a, 491a-92a, 495a-96a.[6] Consequently, the Articles were included in both print and electronic copies of the Publications, together in the case of *GPO* with everything else that appeared in that particular edition or in the case of NEXIS and *NYTO* with the rest of the editorial content.

Respondents hold copyrights in each of the Articles. They brought this suit asserting that petitioners, in the absence of a contract, obtained only "first, one time, North American *print publication rights*," to their contributions and that, upon print publication, the petitioners' right to include their Articles was "exhausted." Compl. ¶¶ 32, 290, 368, 394, 446, J.A. 29a, 38a, 44a-45a, 50a (emphasis added). Under their theory, the reproduction and distribution of the Publications in any non-print medium — including not only electronic libraries and CD-ROMs but also microfilm and microfiche — infringe respondents' copyrights in the Articles.

II. The Relevant Statutory Provisions.

The Copyright Act distinguishes between the copyright in a periodical and that which exists in an individual contribution to the periodical. Periodicals are defined as "collective works," which are a species of "compilation." 17 U.S.C. § 101. Collective works are composed of various individual works, which can

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5. *See* Copyright Law Revision, Part 1, at 87, J.A. 556a (Section 201(c) governs when "there is no express agreement . . . as to the assignment of rights.").

6. Moreover, many of the respondents admitted to being familiar with and having used NEXIS, as well as microfilm, for some time before filing suit. J.A. 388a, 393a-94a, 449a-50a, 453a. Their lawsuit also followed, by over nine years, prior unsuccessful efforts by freelancers and others to convince Congress to limit publishers' rights under Section 201(c). *See infra* at 37-38.

be separately copyrighted. *Id.*[7] Under Section 103(b), "[t]he copyright in [a compilation] is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U.S.C. § 103(b). In order to be entitled to this compilation copyright, a collective work must reflect a unique "selection, coordination, or arrangement." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 357 (1991).

Individual authors always remain free to exploit their individual contributions whether or not a publisher has a copyright in the compilation. Under Section 201(c), however, publishers presumptively are privileged to reproduce and distribute individually copyrighted contributions in several respects:

> Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution *as part of* [1] *that particular collective work*, [2] *any revision of that collective work, and* [3] *any later collective work in the same series.*

17 U.S.C. § 201(c) (emphasis and numbering added).

III. The District Court's Decision Rejecting Respondents' Copyright Infringement Claim.

After extensive discovery, the district court framed the question on summary judgment as whether the electronic copies are privileged under Section 201(c), or, as the respondents

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7. Because staff writers (unlike freelancers) are employed by publishers, the publishers are deemed the "authors," and hence the presumptive owners, of the copyrights in all staff-contributed articles. 17 U.S.C. §§ 101 (defining works for hire), 201(b) (deeming employer the "author" of work made for hire).

maintain, "exploit plaintiffs' individual articles" in an entirely separate periodical or "new anthology" and, therefore, infringe upon respondents' copyrights. Cert. App. 17a, 32a-33a. The district court emphasized that a "plain reading" of the term "any revision" in Section 201(c) precluded respondents' claim. *Id.* 58a. It rejected respondents' view that "any revision" should be read narrowly to encompass only "new" or "up-to-date" versions of a prior work in the same medium in which the work originally appeared. Such a reading, the district court recognized, would be inconsistent with the plain meaning of the term "any revision":

> Congress plainly intended to prevent publishers from reshaping or altering the content of *individual articles*. With this limitation in place, Congress apparently was willing to permit publishers significant leeway, *i.e.*, the leeway to create "any revision" of their collective works.

Id. 59a (emphasis added). The district court further rejected respondents' proposed paper-only limitation as contrary to the media-neutral framework of the Act. Quoting from the legislative history on this very point, the court emphasized that the rights in the Act were "granted in such a way that they can be adapted as time goes on to each of new advancing media." *Id.* 57a.

The district court also reviewed the specific legislative history regarding Section 201(c) noting the many compromises brokered "through a unique and lengthy process involving the input of numerous experts from assorted interest groups and industries." Cert. App. 41a. This history confirms the expansive scope that the ultimate compromise accorded to the "any revision" privilege. An early draft of Section 201(c) proposed allowing publishers to reproduce an individual contribution "as part of that particular collective work and any revisions of it." *Id.* 59a. Focusing on the ambiguity of the word "it," authors argued that "[i]f that means 'any revision of the collective work' in terms of ***changing the contributions, or their***

order, or including different contributions, obviously the magazine writers and photographers would not object." *Id.* 60a (quoting Harriet Pilpel, "a prominent author representative") (emphasis added). Authors feared, however, that the clause as written might give publishers "a right to make revisions *in the contributions* to the collective work. This is not and should not be the law." *Id.* 59a-60a (emphasis added). "In other words," as the district court concluded, "authors were comfortable permitting publishers broad discretion in revising their collective works, provided that individual articles would remain intact." *Id.*

With this understanding of the "any revision" language confirmed by the Act's text and legislative history, the district court next considered whether the electronic copies on NEXIS and the UMI CD-ROMs fell within the "any revision" privilege of Section 201(c). The court recognized that, notwithstanding the considerable breadth of the "any revision" clause, a revision still "must be recognizable as a version of a preexisting collective work if it is to be fairly characterized a revision of 'that collective work.' " Cert. App. 61a. Turning again to the statutory definitions in the Act, the district court reasoned that periodicals are compilations, defined as "work[s] formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." *Id.* 62a; *see also* 17 U.S.C. § 101. Because this selection or arrangement is the essence of the collective work copyright, "defendants must preserve some significant original aspect of those works — whether an original selection or an original arrangement — if they expect to satisfy the requirements of Section 201(c)." Cert. App. 63a.

The district court found no genuine dispute over whether the original editorial selection of the Publications is retained in the electronic copies. That "selection remains evident online" because petitioners uniformly include

information identifying the publication, edition and even pagination of the hard copy edition in which each article originally appeared. Cert. App. 71a. Moreover, "there is no intervening original selection of articles that might render NEXIS or UMI's CD-ROMs separate collective works." *Id.* 70a n.13. The district court concluded that the failure to retain the exact arrangement as well as the entire selection reflected in a paper copy of a particular periodical is only of "peripheral concern," because petitioners retain their single most important original contribution: their editorial selection of the individual articles to be published in any given hard copy periodical. *Id.* 72a-73a; *see also id.* 69a ("*The New York Times* perhaps even represents the paradigm, the epitome of a publication in which selection alone reflects sufficient originality to merit copyright protection. Identifying 'all the news that's fit to print' . . . is a highly subjective undertaking, one that different editors and different periodicals undoubtedly perform with varying degrees of success.").

Because the court recognized that the editorial selection retained by petitioners in the electronic copies is substantially similar to the selection contained in the original paper copies, it concluded the electronic copies fit well within the broad "any revision" privilege of Section 201(c). Cert. App. 76a. The district court further reasoned that the differences between the electronic and print copies of the Publications — a loss of above-the-fold or below-the-fold placement, column formatting and agate-type entries — are precisely what makes the electronic copies "revisions," as opposed to being "that collective work" itself under Section 201(c). *Id.* 73a-74a, 76a. These differences, moreover, are not even present on image-based CD-ROM products, which reproduce images of the Publications as they appear in print. Indeed, although the district court did not expressly address *GPO*, other than to note that "plaintiffs struggle[d] to explain their objections" to both it, *id.* 64a n.12, and microfilm, *id.* 50a n.7, *GPO* constitutes nothing more than a photographic transfer (just like microfilm)

of the Publications from hard copy to an electronic, CD-ROM medium. Thus, its reproduction and distribution also fall within Section 201(c)'s privilege for reproducing individual contributions as part of "that collective work."[8]

The district court rejected respondents' contentions that its holding resulted in a windfall to publishers or left freelancers without any significant protection under Section 201(c). Rather, as the district court recognized, respondents may, under Section 201(c), prevent any exploitation of their individual articles apart from the collective work in which they originally appeared. Cert. App. 77a. For example, the *Times* could not sell a freelance sports piece to *Sports Illustrated*, or rework that article into a short story, a television program or a movie.[9] This fundamental distinction between individual copyrights and collective work copyrights reflects the essential congressional compromise embodied in Section 201(c) and the economic reality that publishers have a legal and normative right to exploit the collective work that is the product of their authorship.

IV. The Court Of Appeals' Decision Finding Copyright Infringement.

On respondents' appeal, the Second Circuit reversed, holding as a matter of law that "Section 201(c) does not permit [petitioners] to license individually copyrighted works for inclusion in the electronic databases," even if the entirety of

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8. *See infra* at 21-25 (explaining that change in medium does not change underlying work).

9. In addition, because Section 201(c) creates only a presumption in favor of publishers, freelancers remain free to secure greater copyright protection by contract, provided they expressly carve back the Section 201(c) default. Section 201(c) operates to permit publishers to republish a contribution in the three ways set forth "unless there has been an express transfer of more." *See* H.R. Rep. No. 2237, at 117, J.A. 663a. For this reason, the contract entered into between petitioner Time Inc. and respondent Whitford, which did not explicitly alter the default § 201(c) allocation, cannot change the result dictated by that section. The district court properly so concluded. Cert. App. 39a-40a.

each Publication is so licensed. Cert. App. 7a. It read the third clause of Section 201(c) (a "later collective work in the same series") as setting "the outer limit" on the scope of "what the Publisher may do." *Id.* 10a. The Second Circuit therefore reasoned that the second ("any revision") clause must be read narrowly to permit reproduction and distribution only in less substantial revisions — those that are only "somewhat altered from the original," *id.* 11a, whatever that might mean.

The Second Circuit found that the electronic copies in this case could not fit within its narrow conception of the Section 201(c) privilege. It asserted, without any citation to the record, that petitioners "strip[]" individual issues of the Publications "into separate files representing individual articles," which are then transmitted to the electronic copy licensees. Cert. App. 4a. The court also focused on the purportedly "substantial portion" of the Publications that are not transmitted to NEXIS, such as "formatting decisions, pictures, maps and tables, and obituaries." *Id.*[10] Notwithstanding its acknowledgement that "individual articles are 'tagged' with data indicating the section and page on which the article initially appeared," the Second Circuit focused on paper-specific aspects of the Publications' arrangement that were not (because they could not be) displayed in ASCII-text format: *i.e.*, "certain information relating to the initial page layout . . . , such as placement above or below the fold in the case of The New York Times." *Id.*

The Second Circuit relied heavily on an analysis of how end-users can retrieve or access particular information stored in the electronic libraries. It established the new legal principle that a publisher may be liable for *direct* copyright

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10. In fact, all of the editorial content, including obituaries, is reproduced in the electronic copies. Advertisements, including those in the form of paid death notices, are not. Such material is added after the editorial selection is made and transmitted to the printers. J.A. 197a-98a, 203a.

infringement (the theory advanced by respondents) simply by publishing electronic copies of periodicals that permit *third parties* to retrieve individual articles:

> Subscribers to NEXIS are able to access an almost infinite combination of articles from one or more publishers by using the database's advanced search engine. The articles may be retrieved individually or, for example, together with others on like topics. Such retrieval makes the article available without any material from the rest of the periodical in which it first appeared.

Cert. App. 4a. Similarly, the CD-ROM products "contain[] many articles that may be retrieved [through a search engine] according to criteria unrelated to the particular edition in which the articles first appeared." *Id.* 16a.

The Second Circuit believed that the ability of end-users to retrieve articles could not be reconciled with the Act in two respects. First, it maintained that such individually accessible electronic copies fail to retain the original "selection" of the print edition inasmuch as "the Authors' works are now available to the public on one or more electronic databases and may be retrieved individually or in combination with other pieces originally published in different editions of the periodical or in different periodicals." Cert. App. 6a-7a. The court concluded that such a process results in "at best a new anthology of innumerable editions of the Times, and at worst a new anthology of innumerable articles from these editions," but *not* "a 'revision' of any (or all) particular editions." *Id.* 17a.

Second, it opined that the availability of individually accessible electronic copies itself infringes upon authors' rights to exploit their individual contributions:

> Section 201(c) would not permit a Publisher to sell a hard copy of an Author's article directly to the public even if the Publisher also offered for individual sale all of the other articles from the

> particular edition. We see nothing in the revision provision that would allow the Publishers to achieve the same goal indirectly through NEXIS.

Cert. App. 13a. Turning to the image-based *GPO* CD-ROM, the Second Circuit acknowledged that the editorial selection and arrangement of the paper copies are reproduced *exactly* as they are in other image-based media such as microfilm, but summarily opined that such image-based media also infringe because (as can be true of microfilm spools and microfiche sheets) they can contain articles from numerous other periodicals, rendering *GPO* "at best a new anthology." *Id.* 17a.

On April 26, 2000, the Second Circuit stayed its mandate upon a showing by petitioners, through undisputed sworn declarations, that the judgment below would cause irreparable injury both to petitioners and to the public. J.A. 15a, 526a-42a. In particular, the decision below will require publishers and electronic database companies nationwide to delete hundreds of thousands of electronically stored freelance news articles, book reviews, stories sent in by stringers, letters to the editor, Op-ed pieces and other materials. J.A. 532a. As the declarations explained, any suggestion that publishers and freelance authors could "contract around" the problem ignores the practical impossibility of locating and negotiating with tens of thousands of individual authors, their transferees in interest, and/or heirs, in the face of class action litigation regarding the use of articles already published in electronic copies. J.A. 535a, 542a.[11]

SUMMARY OF THE ARGUMENT

Petitioners' reproduction and distribution of the electronic copies at issue are privileged under Section 201(c) of the

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11. Multiple class action and other complaints have been filed against publishers and their licensees based on the Second Circuit's decision in this case. *Laney v. Dow Jones & Co., Inc.*, 00 Civ. 769 (D. Del.); *The Authors Guild, Inc. v. The Dialog Corp.*, 00 Civ. 6049 (S.D.N.Y.); *Posner v. Gale Group, Inc.*, 00 Civ. 7376 (S.D.N.Y.).

Copyright Act. Petitioners' copyrights in their collective works, *see* 17 U.S.C. § 103(b), entitle them to reproduce and distribute those works, a process that necessarily involves distributing the individual contributions. Congress accordingly provided in Section 201(c) that a publisher may reproduce and distribute individually copyrighted contributions as part of the original collective work or "any revision" thereof. In this case, the ASCII-text electronic copies in the NEXIS database and those on the *NYTO* CD-ROM qualify as "revisions" and the image-based copies (those on the *GPO* CD-ROM) also qualify as the original collective work. The Second Circuit's view — that the electronic copies infringe because they combine multiple periodical issues into "new anthologies" and because they permit researchers quickly and efficiently to retrieve individual articles — conflicts with fundamental copyright principles, as is evident from the fact that it would invalidate longstanding, widespread applications of the Section 201(c) privilege to media such as microfilm and microfiche.

I. The Act's plain text establishes that the "any revision" privilege of Section 201(c) is broad and encompassing. The term "revision" contemplates substantial changes to the original work. *E.g.*, *Webster's Third New Int'l Dict.* 1944 (1968) ("revise" is "to make a new, amended, improved or up-to-date version," including by "incorporating *major* revisions" (emphasis added)). Moreover, the Act privileges "*any*" revision of the collective work, a term of considerable breadth. *E.g.*, *Freytag v. Commissioner*, 501 U.S. 868, 874 (1991); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980).

Moreover, the Act was purposefully drafted in media-neutral terms to facilitate the transfer of a work between paper and electronic copies. The Act provides both that a "work," such as the collective works in this case, may be fixed in any medium "now known or later developed" and

that the "copies" reproduced and distributed by petitioners are the material objects, "in which a work is fixed by any method now known or later developed." 17 U.S.C. §§ 101, 102(a). Accordingly, petitioners' publications are the same "works," whether fixed in paper editions, photographed for microfilm, "burned" onto a CD-ROM or electronically copied to a computer server.

The Second Circuit erred by ignoring the Act's plain meaning, purporting instead to infer Congress' intent from the structure of Section 201(c). It deemed the first clause of Section 201(c) ("that particular collective work") a "floor" for the rights of publishers, the third clause ("any later collective work in the same series") a ceiling, and the second clause ("any revision") some sort of middle level between the other two. Other than that Section 201(c) has three clauses (also true of innumerable other federal statutes that *never* have been construed in this floor-to-ceiling manner), nothing supports this construction. All three clauses represent overlapping publishing practices familiar to Congress at the time of the Act's adoption, and all were essential to the compromise between the interests of publishers and authors that Section 201(c) embodies. When the terms of a statute stand on their own and there is no indication that Congress intended those terms to limit each others' scope, resort to the canons of construction applied by the Second Circuit is inappropriate. *E.g.*, *Harrison*, 446 U.S. at 589 (*ejusdem generis*); *Babbit v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 702 (1995) (*noscitur a sociis*).

II. The Copyright Act's legislative history, recognized as a uniquely important interpretive tool in the context of the Act but essentially ignored by the Second Circuit, confirms that the electronic copies in this case are privileged. The legislative history makes plain that the essence of the Section 201(c) compromise was to preserve the rights publishers enjoy in their collective works in three particular ways, while allowing authors, for the first time, to retain rights to their individual contributions.

Under precedents interpreting the predecessor Copyright Act of 1909, authors had lost essentially *all* rights to their contributions submitted to publications, such as sequelization, novelization, screenplay and merchandise rights. *E.g.*, *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 334 (S.D.N.Y. 1968); *Alexander v. Irving Trust Co.*, 132 F. Supp. 364, 369 (S.D.N.Y.), *aff'd*, 228 F.2d 221 (CA2 1955), *cert. denied*, 350 U.S. 996 (1956). Congress intended to correct this, expressly providing that publishers secure rights "only" with respect to their "collective works."

Consistent with authors' right to exploit their *individual* works, Section 201(c) allows a collective work "revision" to include quite substantial changes. *E.g.*, Copyright Law Revision, Part 3, at 261, J.A. 591a (statement of Bella Linden, publishers' representative, leading to reformulation of Section 201(c) draft) (maintaining that publishers have the right to distribute "a volume containing only *half* of the material in 'that particular collective work' ") (emphasis added). Importantly, the contrary view of some authors was considered but not adopted. Indeed, Congress subsequently twice considered but did not adopt proposals to amend Section 201 that would have provided freelance authors the relief that respondents seek here.

Congress also was quite conscious of the development of electronic libraries similar to NEXIS, the predecessors of which already existed in the 1960s and 1970s and the expansion of which was accurately predicted by testifying witnesses. Congress plainly intended to facilitate, not impede, the development of such easily accessible electronic libraries.

III. The petitioners' electronic copies easily fall within the Section 201(c) privilege. The image-based electronic copies (those on the *GPO* CD-ROMs) are precisely the same "works" as the hard copy editions and thus qualify as "that collective work" under the Act's media-neutral provisions. The Second Circuit's conclusion that these copies, which are exact

duplicates of every page of the *New York Times Book Review* and *Sunday Magazine*, fall outside of Section 201(c) is inexplicable.

The image-based copies, like the ASCII-text-based electronic copies (NEXIS and the *NYTO* CD-ROMs), also qualify as permissible "revisions" of the hard copy editions. The ASCII-text copies contain the *entire* editorial content of the periodicals, including all of the articles, features, letters to the editor and the like. All that is excluded are graphical materials (such as advertisements) and other agate-type materials that are incompatible with ASCII-text electronic libraries. Indeed, the publishers daily transmit to NEXIS the exact files used to print the hard copy editions of the Publications, without any intervening selection or modification to individual contributions, and electronically tag each file with information regarding the publication and page on which the article appeared in hard copy.

The Second Circuit also erred in its conclusion that the electronic copies are infringing "new anthologies" of the Publications because multiple editions rest together in a single storage medium, here the NEXIS computer servers and individual CD-ROMs. That conclusion misunderstands electronic media — which necessarily involve the storage of numerous files on a single "disc" — in the context of the Copyright Act, which recognizes that a distinct "work" is created when "fixed" in any medium. The transfer of the Publications from hard copy to electronic media is a purely "mechanical" act furthermore that cannot be said to create a new work. *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991). The Second Circuit's reasoning, moreover, invalidates longstanding publishing practices such as the distribution of microfilm and microfiche, which often contain multiple editions of a particular periodical on a single piece of film.

Similarly unavailing is the Second Circuit's assertion that the electronic copies fall outside the Section 201(c) privilege because end-users may retrieve individual articles

from the libraries. Respondents' complaint alleges only a claim of direct copyright infringement by petitioners. "Third party conduct would be *wholly irrelevant* in an action for direct infringement." *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 446 (1984) (emphasis added). As noted, petitioners not only include the Publications' entire editorial content in the electronic libraries, but also market those libraries as containing complete editions of the periodicals. Moreover, the Second Circuit's analysis would render microfilm and microfiche infringing, both of which are used by researchers for the near-exclusive purpose of retrieving individual articles.

Finally, the Second Circuit's decision would have devastating effects upon the contents of electronic libraries if not reversed. Hundreds of thousands of non-staff-written contributions would have to be deleted from services such as NEXIS. CD-ROMs would have to be destroyed because it is impossible to delete individual articles. The impact on electronic archives as a useful tool for research would be inestimable.

The judgment accordingly should be reversed.

ARGUMENT

I. Congress Intended Publishers To Continue To Be Able To Make Their Publications, And Any Revisions Of Them, Available To Researchers And The Public.

A. The Text Of The Copyright Act Establishes That The Electronic Copies In Dispute Are Privileged.

1. *The Phrase "Any Revision."* The Copyright Act grants periodical publishers a copyright distinct from that held by the authors of individual contributions. *See* 17 U.S.C. § 103(b). To permit the unrestricted exploitation of that collective work copyright in specifically authorized ways, Section 201(c) of the Act expressly permits publishers to reproduce and distribute their collective works, including any separately copyrighted contributions, as part of the original ("that particular") collective work,

"any revision" thereof and any later collective work in the same series. *See id.* § 201(c). The electronic copies at issue — which preserve the entire editorial content of the hard copy version and in some instances are exact photographic duplicates — plainly qualify as "revisions." Indeed, the *GPO* copies also qualify under the "that particular" collective work clause because they are *identical* to the hard copies and differ only in that they have been transferred to a new medium.

The second of these privileges is particularly broad.[12] To "revise" a collective work is "to make a new, amended, improved or up-to-date version" of it; similarly, a "revised edition" is an edition "incorporating *major* revisions . . . and often supplementary matter designed to bring it up to date." *Webster's Third New Int'l Dict.* 1944 (1968) (emphasis added);

12. To narrow that scope, respondents argued below that because Section 201(c) refers to a "privilege," publishers lacked a "right" that could be licensed. This distinction was rejected by the district court as contrary to the plain language of the Act, a conclusion left undisturbed by the Second Circuit. Cert. App. 47a-50a. The Act's legislative history, which consistently employs the terms "rights" and "privileges" interchangeably, confirms this. *See* Copyright Law Revision, Part 1, at 87-88, J.A. 556a (describing Section 201(c) "privilege" as a "right"); *see also* Copyright Law Revision, Part 3, at 267, J.A. 595a (statement of E. Gabriel Perle of *Time* to same effect); *id.* at 258, J.A. 585a (Abe A. Goldman, of the Copyright Office legal staff, later Acting Register, to same effect); 112 Cong. Rec. 24,066 (1966), J.A. 657a (statement of Rep. Robert Kastenmeier, later Chairman of the Subcommittee of the House Judiciary Committee responsible for the copyright laws, to same effect). The use of the word privilege, as this Court concluded in *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 175-76 (1984), in connection with Sections 203(b)(1) and 304(c)(6)(A) of the Act, simply refers to grants that cannot be terminated.

Moreover, Section 201(d)(1) permits partial transfers of copyright by "operation of law." Section 201(d)(2) of the Act, in turn, permits any of the exclusive rights comprised in a copyright, "including any subdivision of any of the rights specified by section 106," to be transferred. The "privilege" accorded publishers is precisely such a "subdivision" of copyright transferred by "operation of law." Its further conveyance, therefore, is expressly authorized by Section 201(d)(2).

Stewart v. Abend, 495 U.S. 207, 233-35 (1990) (emphasizing the importance of a plain meaning interpretation of the 1909 Copyright Act). Indeed, the Act itself contemplates that a "revision" can be so substantial that it would otherwise qualify as an entirely new copyrightable work. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (meaning of a term in a statute is determined by "the broader context of the statute as a whole"). Thus, a "derivative work" (which is a new work under the Act) is defined to include "[a] work consisting of editorial revisions . . . which, as a whole, represent an original work of authorship." 17 U.S.C. § 101. If, as the district court noted, "*editorial* revisions" can create a new, original work of authorship, then *a fortiori*, the broader term "*any* revision" clearly must encompass the less significant changes made to the Publications in this case. Cert. App. 58a (emphasis added).

The breadth of conduct privileged under Section 201(c) is reinforced by Congress' use of the word "any" to modify "revision." "Any" is a phrase conspicuous for its breadth, as this Court repeatedly has confirmed. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) ("expansive" use of " 'any other final action' . . . offers no indication whatever that Congress intended the limiting construction . . . respondents now urge") (emphasis in original); *Freytag v. Commissioner*, 501 U.S. 868, 874 (1991) (noting "broad sweep" of phrase "any other proceeding"); *United States v. Turkette*, 452 U.S. 576, 580-81 (1981) ("any person" and "any individual" admitted of "no restrictions upon the associations embraced by the definition"). The use of "any" does not permit the limits artificially imposed by the Second Circuit, as by constraining the privilege to "later editions of a particular issue of a periodical" or the "new edition of a dictionary or encyclopedia." Cert. App. 10a.

2. *The Act's Uniformly Media-Neutral Provisions.* That "any revision" encompasses not just print, but also electronic, copies is plain from other provisions of the Act that define and inform the fundamental concepts used in Section

201(c). In this regard, the Second Circuit erred by examining Section 201(c) in isolation, thus violating the precept that a reviewing court must interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), placing each constituent part "into an harmonious whole." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959).[13]

Congress carefully drafted the Act in media-neutral terms that contemplate and encourage the development and use of new technologies. The concept of media neutrality runs throughout the Act, beginning with its definitional provisions. The core element of copyright is the "work," which the Act provides may be fixed in any medium "now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a); *see also* H.R. Rep. No. 1476, at 52, J.A. 695a (noting that "it makes no difference" how a work is fixed; it remains the same "whether embodied in a physical object in written, printed . . . magnetic or any other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed' ").[14] A "work" is reproduced and/or distributed — the core concepts embedded in Section 201(c) — in the form of "copies." 17 U.S.C. §§ 106(1) & (3). "Copies" are defined as "material objects . . . in which a work is fixed by any method now known or later developed," including a version created "with the aid of a machine or device," *id.* § 101, such as a computer. Accordingly, the plain language of

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13. The Second Circuit's approach contrasts sharply with that adopted by the district court, which emphasized that a "principled" analysis of Section 201(c) required it to consider it "alongside other sections of the Act." Cert. App. 41a.

14. The Act itself emphasizes that a machine or device can be one "now known or later developed." 17 U.S.C. § 101.

Section 201(c) and the other related provisions of the Act requires an interpretation of "any revision" that encompasses not only copies of periodicals that are revised as to content, but also those revised in ways that allow them to be "fixed" in some new medium.[15] The Act thus ensures that the transfer of a work between media — as when a periodical is transferred between paper and electronic copies — is not regarded as either altering the character of, or infringing, that work.

Thus, the Second Circuit had it entirely wrong in finding copyright infringement based principally on factors that inevitably arise from the transfer of petitioners' collective works between media — including particularly the ability of end-users to search electronic media and retrieve individual articles. Under the Copyright Act, any work, including a collective work, remains the same regardless of how or where "copies" are "fixed": whether printed on paper, photographed for microfilm, "burned" onto a CD-ROM, or electronically copied to a computer server. *Id.* § 101 (defining "fixed").[16] Each of those acts of reproduction creates a "copy," but only of the same work "fixed" in a different medium. In other words, whether a given collective work, or any revision thereof, is printed, reproduced on CD-ROM or stored on a larger disc housed in the NEXIS central servers, all are "copies" of the same

15. The Act broadly defines a work as "fixed" whenever it "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. The Act's consistent use of basic terms like "reproduce" and "distribute" makes clear that Congress intended to grant publishers a broad, presumptive privilege to embody and disseminate their collective works and any revisions of those works in any medium.

16. *See* H.R. Rep. No. 1476 at 53, J.A. 697a ("[A] 'book' is not a work of authorship, but is a particular kind of 'copy.' Instead, the author may write a 'literary work,' which in turn can be embodied in a wide range of 'copies' and 'phonorecords,' including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth.").

"work" authorized to be reproduced and distributed by publishers under Section 201(c).[17]

Having ignored all of this, the Second Circuit's opinion allows the copyright status of a work to be dictated by its medium of fixation and creates a new and unworkable rule of copyright law. Under its reasoning, the independent copyright status of a work evaporates if it is stored digitally on a medium that also stores other works because, once so "commingled," its original selection is lost and it then represents part of a "new anthology." Cert. App. 17a. This reasoning cannot be reconciled with this Court's ruling in *Feist*. The wholesale translation of entire books and periodicals into the digital medium is so "mechanical or routine as to require no creativity whatsoever," and therefore cannot create the "new" work that the Second Circuit found. *Feist*, 499 U.S. at 362.

The Second Circuit incorrectly concluded that storing multiple collective works together creates a "new anthology," Cert. App. 17a, relying on legislative history that simply makes clear that Section 201(c) was not intended to allow *individual* articles to be selected for inclusion in a separate anthology. House Report at 122-23, J.A. 706a (Section 201(c) is not intended to authorize publishers to include "the contribution itself" in "a new anthology or an entirely different magazine or other collective work"). That legislative history simply recognizes that publishers, apart from the specific publishing practices sanctioned by Section 201(c), generally do not reproduce or distribute the individual contribution apart from the collective work in which it is included. The Second Circuit's approach, however, creates new anthologies — and infringing works — with alarming

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17. Given the breadth of these definitions, the district court correctly observed that "the right to reproduce a work, which necessarily encompasses the right to create copies of that work, presupposes that such copies might be 'perceived' from a computer terminal." Cert. App. 52a.

frequency when two or more independent works, even by the same publisher, are stored together in a single medium. Such reasoning has the potential to transform the hard drive of every PC and laptop computer that contains multiple files into an infringing anthology and upsets settled law that changing the medium in which a copyrightable work is displayed does not create a new work. *See L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (CA2) ("the mere reproduction of a work . . . in a different medium should not constitute the required originality"), *cert. denied*, 429 U.S. 857 (1976). As the Second Circuit itself concluded only a few years ago, immersion of a work in a larger database does not cause the original work to lose its independent copyright status. *CCC Info. Serv. v. MacLean Hunter Market Reports*, 44 F.3d 61, 68 n.8 (CA2 1994), *cert. denied*, 516 U.S. 817 (1995). In copyright terms, the medium is *not* the message.

3. *The Second Circuit's Flawed Textual Analysis.* The Second Circuit's contrary holding rests not on the meaning of "any revision" or the Act's many media-neutral terms, but instead on a supposed inference improperly drawn from the *structure* of Section 201(c). Addressing the three privileges granted to publishers in the three clauses of Section 201(c), the court of appeals deemed "that particular collective work" a "floor," "any later collective work in the same series" a "ceiling," and the penultimate category — "any revision" — some sort of middle level that must be less expansive than the "ceiling."

There is no support for this rigid "floor to ceiling" analogy, in which three traditional and overlapping publishing practices, well known to Congress when it adopted the Act in 1976, are hermetically sealed from each other. To the contrary, these clauses were intended to assure publishers the ability to continue to reproduce and distribute their collective works in ways that were not controversial: to publish, revise and republish periodicals, encyclopedias, textbooks and other collective works without having to

re-seek permission to include each separately copyrighted contribution. *See, e.g.*, H.R. Rep. No. 2237, at 117, J.A. 664a (201(c) presumes "the privilege of *republishing* the contribution") (emphasis added), H.R. Rep. No. 1476, at 122, J.A. 706a (same).

The first clause ("that particular collective work") addresses the magazine, newspaper or encyclopedia edition in which the article is first published. The third clause, "later collective work in the same series," means that "a publishing company could reprint a contribution from one issue in a later issue of its magazine." H.R. Rep. No. 1476, at 122, J.A. 706a. Within the last few years, for example, to celebrate its 75th anniversary, the *New Yorker*'s current issues have included full or excerpted articles published over the past decades. The last clause of § 201(c) permits that practice, as the legislative history confirms. *See* n.20 *infra*.[18]

That leaves the second clause — "any revision" — to stand on its own, without the artificial ceiling of the third clause that the Second Circuit erected. The legislative history gives as a specific example of a permissible "revision" "reprint[ing] an article from a 1980 edition of an encyclopedia in a 1990 revision of it." H.R. Rep. No. 1476, at 122, J.A. 706a. Such a "revised" encyclopedia could include numerous changed contributions, far more than is true of the electronic copies in this case.

No principle of statutory interpretation requires Congress to list phrases in a statute in any particular order or permits courts to draw otherwise unsupported inferences from the sequence in which Congress lists them. The canons of

18. Because such resulting works cannot be considered revisions of any particular edition of the *New Yorker*, the Second Circuit was incorrect to assert that petitioners' reading would render the third clause "superfluous." Cert. App. 12a. *See Quality King Distribs., Inc. v. L'anza Research Int'l Inc.*, 523 U.S. 135, 148-49 (1998) (rejecting contention that reading of Act would render clause superfluous because its exceptions "remain applicable in some situations")

statutory construction employed by the Second Circuit (*ejusdem generis* and *noscitur a sociis*) do not support its construction of Section 201(c), because neither applies when, as here, the statutory language is unambiguous. *See Harrison*, 446 U.S. at 589 (because there was "no uncertainty in the meaning of the phrase "*any* other final action," it was "inappropriate to apply the rule of *ejusdem generis*" (emphasis in original)); *Garcia v. United States*, 469 U.S. 70, 74-75 (1984) (*ejusdem generis*); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (*noscitur a sociis*). Further, *ejusdem generis* ("of the same kind"), is inapplicable here because "[e]ach category [in Section 201(c)] describes a separate type of enterprise to be covered by the statute." *United States v. Turkette*, 452 U.S. 576, 582 (1981). Similarly, *noscitur a sociis* (a word or phrase "is known by its companions") is incorrectly used if it alters the meaning of a phrase that has "a character of its own not to be submerged by its association." *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 702 (1995) (quoting *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)). The Second Circuit's method of interpretation has serious implications for all statutes where Congress has listed overlapping categories without intending either an inference from their order or that the categories be deemed mutually exclusive. *E.g.* 18 U.S.C. § 1964(1) (defining RICO enterprise as including "any individual, partnership, corporation, association, or other legal entity").

In sum, the text of Section 201(c) demonstrates that the electronic copies qualify as "revisions" and in some instances as the same "collective work" as the print editions of the periodicals.

B. The Legislative History Also Establishes That Congress Did Not Intend To Interfere With Publishers' Long-Recognized Rights To Reproduce And Distribute Their Publications.

The proper interpretation of the text and structure of Section 201(c) is reinforced by the Act's legislative history. This Court repeatedly has recognized that the Copyright Act's uniquely informative legislative history can aid "understanding of the phrase" in dispute within the Act. *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 156 (1985). Thus, an "undefined statutory term" — such as "any revision" — should be read in light of the legislative history, which details "two decades of negotiations by representatives of creators and copyright-using industries, supervised by the Copyright Office and . . . Congress." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989). Reference to the legislative history ignored by the Second Circuit is particularly appropriate in this case, because Section 201(c) plainly reflects a carefully negotiated compromise that should be enforced as reached. *Abend*, 495 U.S. at 225 (recognizing that "each provision of the 1976 Act was drafted through a series of compromises between interested parties").

1. *The Legislative History Confirms The Breadth Of The "Any Revision" Language.* That Congress intended Section 201(c) to grant publishers the presumptive right to any and all *aggregate* uses of their collective works is clear given its overall purpose: to change the law regarding ownership of contributions under the Act's predecessor statute, the 1909 Copyright Act. *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (statutes should be interpreted in light of their "object and policy"). Under the 1909 Act, the absence of a signed agreement resulted in freelance authors conveying all rights in their articles to a periodical publisher. *Alexander v. Irving Trust Co.*, 132 F. Supp. 364, 369 (S.D.N.Y.) (where there was no contract between the publisher and the plaintiff and no reservation of rights, "it must be presumed"

that the publisher acquired all rights), *aff'd*, 228 F.2d 221 (CA2 1955), *cert. denied*, 350 U.S. 996 (1956); *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 344 (S.D.N.Y. 1968) ("Absent a reservation . . . the copyright and all other rights pass with an . . . unconditional sale.") (citations omitted).[19] Many authors thus unintentionally transferred away a range of rights (such as sequelization, novelization, screenplay or merchandise rights) that had independent value unrelated to the magazine, newspaper or other collective work to which their articles were originally contributed.

To change that result, the Register of Copyrights initially recommended that, under the new Act, "a periodical . . . publisher" automatically acquire only the right to publish a contribution in its periodical or "a similar composite [*i.e.*, collective] work." Copyright Law Revision, Part 1, at 88, J.A. 556a. Harriet Pilpel, representing the views of freelance authors, objected that the reference to a "similar" collective work might result in authors transferring more than the Register intended. She was concerned that by selling an article to a newspaper such as *Newsday* an author also might transfer the right to sell the same article for publication in *The New York Times*, which is a "*similar* composite work." Copyright Law Revision, Part 2, at 151, J.A. 568a. Based on this concern, the Register agreed to a clarification, *i.e.*, that "*similar* composite work" meant "*that particular* composite work" and no other. *Id.* at 153, J.A. 571a (emphasis added).

In response, Horace S. Manges, a publishers' representative, questioned whether the phrase "that particular . . . work" would be broad enough to cover a standard

19. This result was dictated by the doctrine of copyright indivisibility under the 1909 Act, under which only a single owner could have an interest in a copyrighted work at any one time. *See Hirshon v. United Artists Corp.*, 243 F.2d 640, 643 n.3 (CADC 1957) ("[A] copyright is an indivisible thing, and cannot be split up and partially assigned either as to time, place, or particular rights or privileges, less than the sum of all the rights comprehended in the copyright.").

publishing practice: revising an edition of an original collective work to *omit* materials (as is true in the case of NEXIS and NYTO on the view of the facts most favorable to respondents). *Id.* Irwin Karp, another strong pro-author advocate, argued that it did not and that publishers should be required to obtain such rights by contract. *Id.*, J.A. 571a-72a.

The Register's next draft initially adopted Mr. Karp's pro-author approach, providing:

> The owner of copyright in the collective work shall, in the absence of an express transfer of the copyright or of any exclusive rights under it, be presumed to have acquired only the privilege of publishing the contribution in that particular collective work.

Copyright Law Revision, Part 3, at 15, J.A. 579a. Publishers, however, again objected to the exclusion of revised editions:

> The addition of the word "particular" raises in my mind the question as to whether revisions of that collective work would be "that particular work" — whether *a volume containing only half of the material* in "that particular collective work" would therefore be excluded.

Id. at 261 (emphasis added), J.A. 591a (statement of Bella Linden).

The Register ultimately agreed that, in the absence of an agreement to the contrary, such revisions of collective works should be permitted. The next draft therefore included a privilege of reproduction and distribution with respect to not only the original "collective work" but also "*any revisions of it*." Copyright Law Revision, Part 5, at 9, J.A. 604a (emphasis added). Significantly, the Irwin Karp approach, requiring a publisher to contract for the right to republish revised editions, including those "eliminating . . . original contributions," was permanently rejected. Instead, the authority of a publisher to make "any revision," *including a revision containing "only half of the material"* in the

original, became a part of Section 201(c), making clear that decisions as to how a collective work may be revised properly remain with the collective work owner.

Freelance authors, having successfully negotiated a much better arrangement than existed under the 1909 Act, did not object to this. Their sole concern at that point was to ensure that publishers could not revise *individual* contributions, as opposed to mandating retention of the format, layout, selection and other contents of the collective work. For example, Harriet Pilpel acknowledged that if the right to make revisions

> means "any revisions of the collective work" in terms of changing the contributions, or their order, or including different contributions, obviously the magazine writers and photographers *would not object*. . . . [C]onsequently I suggest that the wording at the end of subsection (c) be changed or eliminated to make that absolutely clear.

Id. at 152, J.A. 615a (emphasis added). The Register adopted that recommendation, and refashioned Section 201(c) to clarify that the "any revision" language authorizes any changes to the "particular collective work" as a whole, but not to the individual contribution.[20]

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20. Although the 1964 Revision Bill originally allowed inclusion of freelance contributions only "as part of that particular collective work and any revisions of it," Copyright Law Revision, Part 5, at 9, J.A. 604a, the Magazine Publishers Association objected that this limited "the publication on the part of the publisher to a particular issue of a particular periodical, thereby eliminating the relatively simple and generally accepted right of republication in the same periodical." *Id.*, J.A. 612a. The language "and any later collective work in the same series" was added to the 1965 Revision Bill to cover this other standard publishing practice, not, as the Second Circuit supposed, to impose some artificial limit on the purposely broad "any revision" language that had earlier found its way into the Revision Bill. Copyright Law Revision, Part 6, at 69, J.A. 627a. *See also* n.18 *supra*.

The 1966 House Report, summarizing these extensive negotiations, emphasized the fairness of according publishers "the privilege of republishing the contribution under certain limited circumstances," and deemed it the essence of the Section 201(c) compromise:

> [U]nless there has been an express transfer of more, the owner of the collective work acquires "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." . . . [T]his presumption . . . represents a fair balancing of the equities.

H.R. Rep. No. 2237, at 117, J.A. 663a-64a.[21] The result could not be clearer: Although publishers of collective works cannot, under this congressionally mandated allocation of rights, cherry-pick an illustration from an issue of a newspaper or magazine and sell lithographs of it or turn a contribution into a novel, *cf. Playboy Enters., Inc. v. Dumas*, 53 F.3d 549 (CA2), *cert. denied*, 516 U.S. 1010 (1995); *Geisel*, 295 F. Supp. 331, they are permitted to reproduce and distribute a contribution in ways that Congress agreed

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21. Of note: The drafts of what became Section 201(c), even the later ones covering an expanded range of publishing practices, consistently were hailed by pro-author representatives. *See, e.g.*, Hearings on H.R. 4347, at 1917, J.A. 653a (statement of Prof. W. Albert Noyes, Jr., Chairman, National Academy of Sciences-National Research Council Ad Hoc Committee on Copyright Law Revision) ("regularity and clarity" of Section 201(c) are "particularly favorable for the individual scientific author"); Hearings on S. 597, at 1136, J.A. 667a (statement of Harriet F. Pilpel, American Society of Magazine Photographers and the Society of Magazine Writers) (with the passage of Section 201(c), "[m]any of the confusions and ambiguities in the present law will disappear"); *id.* at 1142, J.A. 671a (statement of Tom Mahoney, Society of Magazine Writers) (the section represents "a major improvement over existing copyright law" because it clarifies "the rights of contributors to periodical literature").

were directly related to their core business — publishing their collective works in any medium.[22]

Ignoring virtually all of this history, the Second Circuit focused on the uncontroversial fact that a publisher cannot extract the "contribution itself" from a collective work and then reuse it in an entirely "new anthology or an entirely different magazine or other collective work." H.R. Rep. No. 2237, at 117, J.A. 664a; Cert. App. 17a. This emphasis is misplaced for three reasons. *First*, as the district court noted, the undisputed facts are that copies of the periodicals in question have been added to and are available through the NEXIS computerized library and UMI's CD-ROMs on an entire issue-by-issue basis. Cert. App. 70a (district court opinion explaining that even respondents recognize "that the complete content of all of the articles from each disputed periodical are available" on the electronic copies). *Second*, as set forth above, neither Section 201(c) nor any other provision in the Act was intended to restrict a publisher's ability to reproduce and distribute the collective work as a whole. *Third*, by no stretch of the imagination, let alone the plain language of the Act and its legislative history, can NEXIS or CD-ROMs be deemed a new anthology or

22. Another decision involving Section 201(c), *Ryan v. Carl Corp.*, 23 F. Supp. 2d 1146 (N.D. Cal. 1998), underscores the balance struck in the Act. *Ryan* held that the Section 201(c) privilege did not apply to a research and photocopying service, the employees of which would visit a "brick and mortar" library and, without license from the contributors or the publishers, directly make reproductions of freelance articles apart from the rest of the collective work in which they appeared. That scenario is the complete opposite of that involved here, where the publishers license the entirety of their collective works to NEXIS and UMI. Because the *Ryan* court correctly recognized that the reproductions before it upset the "predictable and equitable" distinction between copies of individual articles (a use Congress preserved exclusively for the freelancer), *id.* at 1149, and copies of entire original or revised periodicals (which Congress granted to publishers), it properly held such exploitation of *individual* articles to be outside the scope of Section 201(c).

different collective work. They are simply storage media on which copies of works reside in electronic versions.

2. *Congress Was Aware, And Sought To Facilitate The Use, Of Computers And Electronic Copies.* When drafting the Act, Congress took pains to include within its scope future technologies that had yet to be invented or imagined. At the same time, the legislative history reveals that Congress received specific testimony about the advent of computer technology, and the ways works would be stored in electronic form. Accordingly, it is fanciful to suppose that Congress confined publishers' copyright privileges to paper copies. By 1965, Congress knew not only that publishers of collective works already were able to reproduce and distribute those works on electronic information storage and retrieval systems, but also that the significance of reproduction and distribution on such systems would grow tremendously. *Cf. Mills Music*, 469 U.S. at 172 (rejecting Second Circuit's "assum[ption] that Congress was unaware of a common practice in one of the industries that the general revision of the copyright law . . . most significantly affected"). The 1965 Report of the Register of Copyrights to Congress, which contained the final language of Section 201(c) as ultimately enacted by Congress, stated:

> In recent years we have seen, among a multitude of technological developments, the introduction of communications satellites [and] the tremendous growth in information storage and retrieval devices. . . . [W]e now find that even our 1961 recommendations were not flexible and forward-looking enough.

Copyright Law Revision, Part 6, at xiv-xv, J.A. 621a (the "1965 Report"). The 1965 Report devoted an entire section to this very issue. Entitled "*Use in Information Storage and Retrieval Systems*," it recommended against adoption of an "explicit provision" relating to such systems'

"that could later turn out to be too broad or too narrow." *Id.* at 18, J.A. 624a. It continued:

> A much better approach, we feel, is to state the general concepts of copyright in language, such as that in section 106(a), which would be general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works.

Id., J.A. 624a. The 1965 Report directly endorsed the concept of a media-neutral "reproduction" right in connection with electronic copies, acknowledging that

> the actual copying of entire works (or substantial portions of them) for "input" or storage in a computer would constitute a "reproduction" . . . whatever form the "copies" take: punchcards, punched or magnetic tape, electronic storage units, etc.

Id., J.A. 624a.

The 1965 Report and related testimony before Congress are replete with references to the then-current and future capabilities of electronic storage and information systems.[23] *See, e.g.*, Hearings on H.R. 4347 at 1427, J.A. 651a (testimony of Bella Linden) (describing electronic search and retrieval mechanisms for libraries of collective works, such as medical journals and other texts: "Just as in a jukebox when a person pushes the button, the arm finds what he wants, so the searching arm goes along with the discs and picks out what the researcher wants").

23. As the district court noted, "the 1976 Act was plainly crafted with the goal of media neutrality in mind." *See* Cert. App. 30a-57a. As George D. Cary, Deputy Register of Copyrights explained to Congress in 1965: "[Y]ou can read the bill from beginning to end and you won't find it in any reference to computers, [which] are one of the coming instruments of communication in the future. We have tried to phrase the broad rights granted in such a way that they can be adapted as time goes on to each of the advancing media." Hearings on H.R. 4347, J.A. 636a.

Id. at 1146-47, J.A. 647a (Statement of John F. Banzhaf III, President, Computer Program Library) (describing ability of computer information storage and retrieval systems to "scan material at an almost unbelievable speed" and to examine material "for key words and symbols"); Copyright Law Revision, Part 6 at 18, J.A. 623a-24a (same). Indeed, by the 1970s, electronic databases like NEXIS already were being marketed to the public.

Eleven years later, in 1976, the House Report accompanying the Act again noted the "increasing use of information storage and retrieval devices," H.R. Rep. No. 1476, at 47, J.A. 685a, and reaffirmed that one of the purposes of the new Act was to make clear that copies of works could be reproduced in any "form, manner, or medium of fixation . . . capable of perception directly or by means of any machine or device 'now known or later developed.' " *Id.* at 52, J.A. 695a (citation omitted).[24] Having adopted such

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24. Contrary to respondents' position below, it simply is not true that searches of, and retrievals of individual articles from, electronic libraries were not contemplated by Congress. In 1975, as the Act was taking its final form, the congressional committee drafting the Act received direct testimony confirming that computer databases would be used as vast libraries in which complete books and periodicals could be stored and accessed in exactly the way the NEXIS database and UMI CD-ROMs are used today. Hearings on H.R. 2223, at 338, J.A. 676a (testimony of Paul G. Zurkowski, President, Information Industry Association) (under the Act, collective works such as encyclopedias and periodicals would be input, and through computer equivalents of the *Reader's Guide*, located to access individual contributions); *see also* Hearings on H.R. 4347 at 68, J.A. 642a (testimony of Lee Deighton, American Textbook Publishers Institute) (database is an "electronic information center" equivalent to "a duplicating rather than a circulating *library*" (emphasis added)); Copyright Law Revision, Part 3, at 418, J.A. 596a (statement of George Shiffer, National Community Television Ass'n) (computer databases were "kinds of *libraries* as yet uninvented . . . when a manuscript will be fed into a computer and ordered as needed" (emphasis added)).

a flexible approach to the concept of copies, Congress was able to defer the issue of whether the application of copyright law to computer technologies required even further changes in the new Act. Accordingly, it authorized a study of that issue by the National Commission on New Technological Uses of Copyrighted Works ("CONTU"). H.R. Rep. No. 1476, at 116, J.A. 703a-04a.

When CONTU issued its final report (the "CONTU Report") on July 31, 1978, it made only three limited proposals, none of which bears on this case.[25] The CONTU Report concluded, precisely because of the broad definitions of copies and of other concepts, that the new Act already had achieved "the desired substantive legal protection for copyrighted works which exist in machine-readable form." *Id.* at 40, J.A. 715a. In fact, the CONTU Report specifically noted that the "introduction of a work into a computer memory" was to be considered another form of "reproduction of the work" under the Act. *Id.* This specific conclusion directly contradicts respondents' repeated efforts to limit the Section 201(c) privilege to paper-only media.

3. *Congress Twice Rejected Legislation That Would Have Adopted Respondents' Reading Of Section 201.* As the district court properly emphasized, respondents' dissatisfaction with Section 201(c) should be directed to Congress. Cert. App. 79a. It is noteworthy, however, that Congress has, twice since 1976, refused to alter the "fair balancing" embodied in Section 201(c). In 1983, Senator Thad Cochran, supported by the

25. It recommended repealing 17 U.S.C. § 117 as enacted; adding a definition of "computer program" to Section 101 of the Act; and enacting a new Section 117, which provided a copyright safe-harbor for certain copies of a computer program. CONTU Report at 12, J.A. 711a-713a. On December 12, 1980, these recommendations were enacted as law. Pub. L. No. 96-517, § 10(b), 96th Cong., 1st Sess., 94 Stat. 3028 (1980). Having considered this extensive history, the district court concluded that it contradicted respondents' contentions that Congress did not intend the Act to "encompass all variety of developing technologies." Cert. App. 56a.

National Writers Union (which selected the respondents and funded this litigation), J.A. 447a, 459a, introduced a bill that would have altered the Section 201(c) compromise. S. 2138, 98th Cong., 1st Sess.; 129 Cong. Rec. 34,442 (1983), J.A. 731a, 737a. A new Section 201(f) would have permitted a freelance author to bring a federal cause of action to "reform or terminate" the automatic transfer of rights under Section 201(c) when the profits received by the publisher of a collective work "are strikingly disproportionate" to the "compensation" received by the author. S. 2138 § 2(3), J.A. 735a. The proposed cause of action provided that, at any time following a publisher's acquisition of rights under Section 201(c), a plaintiff could claim that

> the terms of the transfer have proven to be unfair or grossly disadvantageous to the author. The court shall decide the action in accordance with the principles of equity, and shall have discretion to reform or terminate the transfer on whatever terms it considers just and reasonable.

Id., J.A. 735a.

This bill would have provided a specific federal cause of action for the claim now advanced by respondents. In fact, one of the equitable factors freelancers suggested for determining if "the terms of the transfer have proved to be unfair" was whether "changes in business practices or media exploitation" had proven "disadvantageous to the author." Hearing on S. 2044 at 45, J.A. 720a (supplemental testimony of ASMP and The Graphic Artists Guild). In 1984, an identically worded bill was introduced in the House of Representatives. *See* H.R. 5911, 98th Cong., 2d Sess., 130 Cong. Rec. 17,729 (1984), J.A. 745a. Neither bill ever was reported out of committee, let alone voted on by either House of Congress.[26]

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26. This Court has overcome its reluctance to draw inferences from a congressional failure to act, *see Brecht v. Abrahamson*, 507 U.S.

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II. The Electronic Copies In This Case Are Privileged Under Section 201(c).

As the text and legislative history establish, Section 201(c) permits periodical publishers to reproduce and distribute their publications electronically. Although Section 201(c) prevents a publisher from reproducing, revising or distributing an individual contribution apart from the remainder of the publications, that principle is not implicated here. Petitioners neither modify the underlying contributions in any respect, nor reproduce or distribute individual articles apart from the collective works of which they are parts. Once the Publishers' editorial selection regarding a given periodical issue is made, the entire editorial content of that issue is included in the electronic copies.

As to both NEXIS and CD-ROM, the facts belie the Second Circuit's characterization that the publishers are indirectly using the service to offer individual articles for sale. Both are marketed in the same way they are created: as repositories of complete periodicals. NEXIS, for instance, is described as "the world's most comprehensive collection," not of articles, but of "international, national and regional publications, such as *The New York Times*, Associated Press, Reuters, *Financial Times (of London)*, *Le Monde* and the *Financial Post*," along with other "trade publications,

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(Cont'd)

619, 632-33 (1993), when, as here, Congress rejects legislation that would have granted the relief sought in the litigation. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 35-36 (1981) ("[I]nsofar as the intent of Congress is reflected in its failure to adopt a proposed amendment, a . . . strong[] inference can be found in the rejection by the 96th Congress of an amendment that would have expressly prohibited the movement of funds between state and national committees of a political party."); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 220 (1983) (it would be "improper for us to give a reading to the Act that Congress considered and rejected").

newspapers, [and] reference data" found in "hard-copy libraries." J.A. 329a-30a. Similarly, UMI markets GPO as featuring "cover-to-cover reproduction of approximately 200 of the most requested general-interest periodicals." J.A. 332a.

The Second Circuit nonetheless found the Section 201(c) privilege inapplicable in this case because NEXIS does not contain the entire contents of the hard copy editions of the publications — *i.e.*, it lacks some "selection" — and it does not perfectly reflect how the articles were placed in the original hard copy editions — *i.e.*, it loses some of the "coordination" and "arrangement." Such minor differences are contemplated both by the nature of the ASCII text medium in which the works are fixed and by the "any revision" privilege. In any event, any such differences are entirely inapplicable to *GPO*, which reproduces, with photographic exactitude, the entire contents of each page of each issue of *The New York Times Book Review and Sunday Magazine*. As to all of the criteria that give collective works their independently copyrightable status, *GPO* is indistinguishable from the hard copy editions, and thus does not contain a "revision," but "that particular collective work."

A. Petitioners Sufficiently Preserve The "Selection" Of The Hard Copy Editions.

Even if the Second Circuit's factual characterization of the electronic copies were correct, it would be legally irrelevant, for the "revision" privilege permits a publisher to change significant elements of the original selection. As noted, the final language of Section 201(c) was arrived at only after extensive debate over the scope of the revision concept, including a description of permitted revisions in which a publisher could change one-half of the content of a collective work. Copyright Law Revision, Part 3 at 261, J.A. 591a.

This Court need not, however, address the farthest extremes of the revision privilege in this case, because the Second Circuit seriously mischaracterizes the nature of the

electronic copies at issue, which are correctly described by the district court's findings on the uncontested summary judgment record. Cert. App. 29a-32a. Just as they do with microfilm copies, petitioners have retained far more of their copyrightable selection than any reading of Section 201(c) requires by retaining the *entirety* —- and not just a substantial portion — of their protected editorial selection. Put simply, the electronic copies of the Publications undeniably retain the single most important defining attribute of their collective work status — the original, creative and protected expression inherent in selecting the articles that comprise the day's or week's news — and they therefore, under any test, fall within the "any revision" privilege of Section 201(c).[27]

Nor is there anything to the Second Circuit's assertion that the electronic copies fall outside the "revision" privilege due to the manner in which the publishers transmit data to NEXIS. The undisputed facts establish that NEXIS receives, on an issue-by-issue basis (daily for *The New York Times* and *Newsday*; weekly for *Sports Illustrated*), a copy of the same computer files the publishers use to create the print version of the periodicals. J.A. 476a. The same is true of the material delivered to UMI to assemble issues of *The New York Times* appearing on *NYTO* CD-ROMs. J.A. 479a. Moreover, the *GPO* CD-ROMs are scanned directly from the paper issues of the periodicals. J.A. 481a. In all cases, copies are mechanically added on a periodical-by-periodical basis, not, as the Second Circuit erroneously asserted, as

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27. In fact, the district court actually applied a stringent test to petitioners' electronic copies, analyzing whether they preserved a "significant" aspect of their collective works so that the revisions remain "substantially similar" to the original. Cert. App. 63a, 75a. Notwithstanding that rigorous standard, the court found it undisputed that a "defining original characteristic" — the "complete selection" of articles in each periodical — survives in the electronic edition "in such a way as to preserve the basic character of those periodicals." *Id.* 96a-97a (internal quotations omitted).

"separate files representing individual articles." Cert. App. 4a; *see id.* 29a-31a (describing process).[28]

B. Petitioners Sufficiently Preserve The "Arrangement" And "Coordination" Of The Hard Copy Editions.

The Second Circuit also erred in concluding that the Section 201(c) "revision" privilege was inapplicable because petitioners failed to preserve the "arrangement" or "coordination" of the hard copy editions of the periodicals. The court asserted that, because a newspaper's "initial page layout is lost, such as placement above or below the fold," Cert. App. at 4a, the newspaper in digitized form has lost "most of its arrangement" and therefore its copyrightable identity, making it a new work. *Id.* 15a.

In the first place, Section 201(c) plainly does not require that the electronic copies reflect the identical arrangement as the hard copy editions, for arrangement can be "revised" just as the selection of articles.[29] As the district court correctly concluded, "selection alone reflects sufficient originality to merit copyright protection." Cert. App. 69a. Thus, the Act expressly provides protection for materials "that are *selected*, coordinated, *or* arranged [to] constitute[ ] an original work of authorship." 17 U.S.C. § 101 (emphasis added).

Respondents' contributions, moreover, are tagged with information — such as the author's identity, the name of

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28. The analysis would be the same even if petitioners separated articles and transmitted them individually to NEXIS, so long as the electronic copies could be reasonably regarded as revisions of the hard copy publications. In order to prevail, respondents must identify a "work" that infringes the copyrights they hold in their individual contributions. The "work" in this instance is said to be the electronic copy of a periodical. For purposes of the infringement analysis, it makes no difference how the electronic copies, or the resulting libraries in which they reside, are assembled.

29. Indeed, even the 1990 revised version of a 1980 encyclopedia expressly contemplated by the Act's legislative history, *see supra* at 26, would have a different arrangement.

the periodical and the page number and column in which it appears — that defines their existence in terms of the initial appearance of the hard copy version of the periodical. These contributions, therefore, are presented as part of "a particular identified periodical, or . . . periodicals," Cert. App. 71a, just as is true, for example, of microfilm or hard copies stored on the shelves of library stacks. The only differences respondents identified in this case were those necessitated by the change in medium, *e.g.*, replacement of typesetting commands with electronic markers (Garson Cert. Opp. 9), loss of the original layout, columnization and page-breaks, if any (Tasini Cert. Opp. 3), and the omission of certain print-specific visuals such as ads, charts and photographs (*id.*). Such changes, dictated by the space and other limitations of ASCII text technology, fall well within the permissible scope of changes authorized by the "any revision" privilege, and are less extensive than the differences that may exist, for example, between the approximately one dozen different daily print editions of the *Times*.

Further, by focusing on paper-only arrangement, the Second Circuit's decision conflicts with the Act's bedrock principle of media neutrality: the differences identified by the Second Circuit as creating new infringing works — the exclusion of graphics and page layouts, and the ability to search articles by keywords — are inherent in, and thus dictated by, all sorts of media expressly contemplated by Congress, including such diverse formats as punch-cards, magnetic tapes and other forms of electronic storage. Electronic media, such as the NEXIS library, simply cannot duplicate print arrangements, because ASCII is a text-based, not photographical, code. *See* n.2 *supra*. The Second Circuit's insistence on "page layout" retention thus is "senseless"[30] and condemns an entire generation of

30. *See* Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum. (Cont'd)

electronic copies as infringing, a result completely at odds with the plain language of the Act. It also would force users to search each stored periodical sequentially, a requirement that would, of course, defeat the purpose and great utility of electronic media.

Consistent with the media-neutral approach of the entire Act, collective works are therefore defined disjunctively, as consisting of materials "that are selected, coordinated, *or* arranged" to make "an original work of authorship." 17 U.S.C. § 101 (emphasis added). The Second Circuit improperly replaced the word "or" with "and," thereby imposing on publishers of collective works an obligation to retain an "arrangement" that is not required by the Act. Preservation of selection alone adequately preserves the original copyrightable aspect of a collective work and paves the way for a permissible revision under Section 201(c) to be stored in a variety of electronic and other media.

III. The Second Circuit's Contrary Analysis Also Should Be Rejected Because It Conflicts With Fundamental Copyright Principles.

Numerous commentators have warned of the devastating effects of the Second Circuit's decision and the wholesale deletion of materials from electronic libraries it portends. *See* Cert. Pet. 13-14. This disruption is a function of the fact that the Second Circuit's decision violates longstanding copyright principles. First, because multiple editions of a periodical are stored together electronically, the Second Circuit incorrectly identified a "new anthology" of multiple

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L. Rev. 516, 531 (1981) (making the point that, because digital information is stored in bits and bytes scattered throughout the storage medium, it is "senseless to seek . . . a specific, fixed arrangement of data. There is simply a collection of information stored in an electronic memory – information that can be arranged and retrieved in variations limited only by the capabilities of the computer and the sophistication of the retrieval program").

editions rather than a collection of individual revisions. Cert. App. 17a. Second, because researchers may retrieve individual articles, it regarded the electronic copies as akin to the impermissible exploitation of individual contributions. The Second Circuit thus characterized NEXIS as "comprising thousands or millions of individually retrievable articles taken from hundreds or thousands of periodicals [from which] articles . . . may be retrieved according to criteria unrelated to the particular edition in which the articles first appeared." *Id.* 14a, 16a (emphasis added).

As applied to the electronic copies involved in this case, the Second Circuit's analysis cannot be reconciled with core copyright principles set forth in the Act or with this Court's decisions in *Feist* and *Sony*. In addition to the manifest conflict with the Act's bedrock principle of media neutrality, the Second Circuit's reading of Section 201(c) cannot possibly be correct, because it would deem microfilm and microfiche to be infringing. Individual spools of microfilm routinely store multiple editions of a single periodical (often as much as a month's worth), but this does not convert them into a "new anthology" of individual editions any more than does the binding together of a year's worth of print periodical copies.[31] Moreover, they are used, just

31. Other examples are easily identified. Although Congress specifically intended, among other things, for a publisher of a volume of "a 1980 edition of an encyclopedia" to be able to "reprint an article" from that edition "in a 1990 revision," H.R. Rep. No. 1476, at 122, J.A. 706a, in the Second Circuit's view the same publisher could not, in order to make that encyclopedia easier to use, publish the revised 1990 copy on a CD-ROM with copies of other volumes comprising the rest of the encyclopedia. Such a revision would constitute a new and infringing collective work, by the Second Circuit's reasoning, because the original contributions in each volume "may be retrieved according to criteria unrelated to the particular [volume] in which the articles first appeared." Cert. App. 16a. Given that in the twelve years since the

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like the copies challenged by respondents, almost exclusively by researchers to locate and copy individual articles. Thus, whether one uses the *Reader's Guide to Periodical Literature* to identify pertinent articles and to access them from paper periodicals or microfilm spools on shelves in a library's stacks or uses the search engine and indices of NEXIS or UMI's CD ROMs, the process and the copyright status of the works and copies used are equivalent in every sense.[32] That a given search request may call for searching multiple libraries and produce results from multiple periodicals does not alter the compilation copyright of each individual periodical.

(Cont'd)
first CD-ROM encyclopedia appeared "it has become by far the dominant format and has made encyclopedias far more available," such a result is untenable. Matthew L. Wald, *Reference Disks Speak Volumes*, N.Y. Times, Feb. 26, 1998, at G12. The Second Circuit's analysis creates risks to publishers and the public that are far from theoretical. National Geographic has been sued by freelance contributors for having reissued all of its prior paper copies on 30 CD-ROM discs entitled "The Complete National Geographic 108 Years of National Geographic Magazine on CD-ROM." *See Faulkner (Douglas) v. National Geographic Soc'y*, No. 97 Civ. 9361 (S.D.N.Y.); *Faulkner (Sally) v. National Geographic Soc'y*, No. 99 Civ. 12488 (S.D.N.Y.); *Greenberg v. National Geographic Soc'y*, No. 97-3924-civ (S.D. Fla.).

32. The Second Circuit further erred by holding that the "any revision" language of Section 201(c) "protects only later editions of a particular issue of a periodical, such as the final edition of a newspaper." Cert. App. 10a. Indeed, even this example of a permissible revision would be infringing under the Second Circuit's insistence on the preservation of arrangements. The "final edition of a newspaper" often alters the "arrangement" of the earlier editions in significant ways, as when a breaking story, placed above the fold, might move an earlier story below the fold, or to a different page entirely.

A. The Decision Below Conflicts With This Court's Analysis Of Direct Copyright Infringement In *Sony*.

The Second Circuit's analysis was improperly end-user driven. Rather than carefully examining the contents of the allegedly infringing copies, it erred by allowing potential third-party retrievals of individual articles to determine whether there has been direct infringement. "Third party conduct would be wholly irrelevant in an action for direct infringement." *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 446 (1984). Because the infringement claims in this case are based entirely on the petitioners' own acts of reproducing and distributing copies of the particular collective works on CD-ROMs and in the NEXIS library, under fundamental copyright law, it was the content of those allegedly directly infringing copies, as they were created and fixed on an issue-by-issue basis, that should have been considered. [33] This the Second Circuit failed to do, except for its erroneous and unsupported conclusion that the electronic copies involve "stripping" the periodicals into their component articles. Cert. App. 4a.

The Second Circuit's own common sense analysis in *Matthew Bender & Co. v. West Publishing*, 158 F.3d 693 (CA2 1998), *cert. denied*, 526 U.S. 1154 (1999), demonstrates how irrelevant third-party use is in direct infringement claims involving the manipulation of database search engines. The *Matthew Bender* court rejected a direct infringement claim based on the very argument asserted here:

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33. The respondents themselves have admitted that "[t]his is not a case in which we have accused the defendants . . . of manufacturing or distributing machines or equipment that can be used by third parties in an infringing way." J.A. 352a. Such a claim, respondents acknowledge, would have permitted the petitioners to raise such defenses as the *Sony* defense of "non-infringing uses." *Id.* Because they did not assert such a claim, the only acts of reproduction and distribution properly before the Court are those that occurred when the publishers transmitted their periodicals to NEXIS and UMI, and when those licensees created the copies in dispute.

that data fixed in no particular manner (other than by coding) on a CD-ROM could be arranged by an end-user to create an infringing configuration. It recognized that "CD-ROM technology is different from paper . . . because the file-retrieval system allows users to retrieve cases in a variety of ways" that are unrelated to the original arrangement on the CD-ROM copy. *Id.* at 705. It refused, however, to take the erroneous next step of concluding that direct copyright infringement arises from a hypothetical user's ability to create an infringing work using "electronic scissors." *See id.* at 706.[34] In both the UMI CD-ROM products and in NEXIS, it is the manipulation of the retrieval system — not the contents of any revised copy — that allows articles to be "recombined" with other articles in a new anthology or downloaded individually. Petitioners, therefore, never make any copy of an article that is or could be regarded as directly infringing.

B. The Decision Below Conflicts With Congress' Goal To Encourage The Development Of New Technologies And Will Result In Wholesale Deletion Of Freelance Contributions.

This Court has stated its "consistent deference to Congress when major technological innovations alter the market for copyrighted materials." *Sony*, 464 U.S. at 431. This basic precept ensures that, not only with respect to this case but even more generally, publishers and their licensees will be afforded certainty regarding the copyright status of their works as they invest in new technologies to promote "the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Accordingly, this Court should reject the Luddite-like approach reflected in the

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34. In fact, far from showing that the copies in dispute were regularly used to access their individual Articles as such, at no point in this litigation did respondents ever demonstrate that, apart from their own searches, anyone had ever used the periodical copies in dispute to do so.

Second Circuit's medium-specific analysis and leave in place the Section 201(c) compromise adopted by Congress and correctly applied by the district court. *Sony*, 464 U.S. at 431 (Congress has the "institutional ability to accommodate fully the varied permutations of competing interests implicated by 'new technology.' ").

The Second Circuit's decision will have devastating real world effects if it is not reversed. Its holding that electronic copies at issue here infringe will render every publisher that distributes its issues electronically, and every database provider and every manufacturer of CD-ROMs that contain such periodicals, an infringer of copyright. Petitioners and those similarly situated will have no alternative but to destroy any CD-ROMs that contain freelance articles and remove all freelance contributions from electronic libraries, because they obviously cannot locate and negotiate with thousands of freelance authors, their heirs and/or assigns, in the face of the "tidal wave" of lawsuits respondent Tasini has threatened and has now begun to deliver. Cert. Pet. 12-13. In fact, publishers across the nation already have assembled instructions for their electronic copy licensees to begin the deletion process, but for the stay granted below and this Court's having granted certiorari, the nation's electronic archives would already have been rendered egregiously incomplete.[20]

Such a result would be untenable, given Congress' understanding of publishing practices and electronic information-storage and retrieval systems in 1976, and the long-standing reliance of publishers and their licensees for nearly twenty years thereafter, until this case was brought. *See Sony*, 464 U.S. at 456 ("One may search the Copyright Act in vain for any sign that the elected representatives of

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20. Michael Rogers & Norman Oder, *U.S. News Pulls Microfilm Contents*, Library Journal, Oct. 1, 2000, at 16-17 (reporting that *U.S. News and World Report* has pulled freelance articles from microfilm as a result of the Second Circuit's decision).

the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.") A proper analysis of Section 201(c) demonstrates that such a result is unnecessary as well.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Second Circuit and remand with instructions that judgment be entered in favor of petitioners.

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APPENDIX

APPENDIX — SELECTED PROVISIONS OF THE COPYRIGHT ACT OF 1976

17 U.S.C. § 201(c)

§ 201. Ownership of copyright

* * *

(c) Contributions to collective works. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

* * *

17 U.S.C. § 101

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

> An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

Appendix

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number

of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

Appendix

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other non-analog format.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

Appendix

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The "gross square feet of space" of an establishment means the entire interior space of that establishment,

and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is —

(1) the Universal Copyright Convention;

(2) the Geneva Phonograms Convention;

(3) the Berne Convention;

(4) the WTO Agreement;

(5) the WIPO Copyright Treaty;

(6) the WIPO Performances and Phonograms Treaty; and

(7) any other copyright treaty to which the United States is a party.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the

nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

For purposes of section 513, a "proprietor" is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.

Appendix

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 908(a), means a registration of a claim in the original or the renewed and extended term of copyright.

To perform or display a work "publicly" means —

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable

of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby

images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a "United States work" only if —

(1) in the case of a published work, the work is first published —

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in, the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

* * *

Appendix

17 U.S.C. § 103

§ 103. Subject matter of copyright: Compilations and derivative works

* * *

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

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